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No. 89-1642

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In the Supreme Court of the United States

OCTOBER TERM, 1989

UNITED TRANSPORTATION UNION, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner, a union for railway employees, lacked standing to challenge the decision of the Interstate Commerce Commission to exempt certain officers or directors of rail carriers from obtaining prior approval to hold the position of officer or director of another rail carrier.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 891 F.2d 908. The order of the Interstate Commerce Commission (Pet. App. 29a-44a) is reported at 5 I.C.C.2d 7. The Commission's order proposing its rulemaking (Pet. App. 45a-53a) is not reported; notice of the rulemaking is published at 53 Fed. Reg. 12,443.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 1989. A petition for rehearing was denied on January 22, 1990. Pet. App. 28a. The petition for a writ of certiorari was filed on April 23, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Staggers Rail Act of 1980 directed the Interstate Commerce Commission to exempt a transaction or class of transactions from its regulation when the Commission finds that: (1) regulation is not necessary to carry out the rail transportation policy set forth in 49 U.S.C. 10101a, and (2) either the transaction is of limited scope, or regulation is not needed to protect shippers from abuse of market power. 49 U.S.C. 10505(a). As the House Conference Report explained, the purpose of Section 10505 was to provide the Commission with sufficient flexibility to accomplish Congress's intention substantially to deregulate the rail industry. H.R. Conf. Rep. No. 1430, 96th Cong., 2d Sess. 105 (1980). Congress expected that "as many as possible of the Commission's restrictions on changes in prices and services by rail carriers will be removed [through the use of Section 10505] and that the Commission will adopt a policy of reviewing carrier actions after the fact to correct abuses of market power." *Ibid.*[1]

2. Section 11322(a) of the Interstate Commerce Act provides that a person may not hold the position of officer or director of more than one rail carrier without the ICC's authorization; the ICC, in turn, may authorize such interlocking directors or officers "when public or private interests will not be adversely affected." 49 U.S.C. 11322(a). Pursuant to its authority under Section 10505, in April 1988 the ICC published a notice of proposed rulemaking to ex-

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[1] The Commission has implemented Section 10505 by exempting from its normal regulatory procedures rail services and transactions in a variety of contexts. See, *e.g.*, *Illinois Commerce Commission* v. *ICC*, 848 F.2d 1246 (D.C. Cir. 1988), cert. denied, 109 S. Ct. 783 (1989).

empt the officers and directors of certain rail carriers from obtaining prior approval for interlocking arrangements under 49 U.S.C. 11322(a). Pet. App. 45a-53a. The proposal applied to interlocking arrangements except those involving two or more "class I" railroads.[2] The ICC explained that its proposal was designed to eliminate the expense and delay accompanying individual applications and exemption petitions. In the ICC's view, the prior approval requirement (except as retained) was unnecessary to further rail transportation policy. Moreover, the Commission emphasized that other federal and state law remedies—including its authority to review a particular transaction or to revoke an exemption (49 U.S.C. 10505(d))—can provide effective relief in the event that an interlocking directorate or officership results in anticompetitive behavior. Pet. App. 48a-49a.

Four comments were submitted on the ICC's proposed rule. The only comments opposing the exemption were those of Patrick W. Simmons, Illinois Legislative Director for the United Transportation Union, a union of railway employees. Simmons argued that the proposed exemption would be anticompetitive, that existing procedures were not burdensome, and that without the prior approval requirement, the ICC and the public would lack the

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[2] The Commission divides the nation's railroads into three classes according to annual operating revenues for three consecutive years. Class I railroads are the largest carriers; there are only 16 of them, but collectively they operate approximately 82 percent of the nation's track mileage, employ 90 percent of the railroad labor force and earn 92 percent of the revenues of the rail industry. There are a total of 484 class II and class III railroads. Pet. App. 4a.

facts needed to evaluate proposed interlocks. After evaluating those comments, the Commission determined that the proposed exemption satisfied the requirements of Section 10505 and issued a decision promulgating final rules. Pet. App. 29a-44a.

3. Petitioner then filed a petition for review to challenge the Commission's decision.[3] The court of appeals dismissed that petition on the ground that petitioner failed to show Article III standing to litigate that claim. Pet. App. 1a-25a.

The court noted that under this Court's precedents, to establish standing a complaining party must show that he has suffered "actual or threatened injury"; that the injury is fairly traceable to the defendant's challenged conduct; and that the injury can be redressed by a decision in the plaintiff's favor. Pet. App. 6a (quoting *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)). The court further pointed out that "abstract," "conjectural," or "hypothetical" claims of injury are inadequate. *Id.* at 6a (quoting *Allen* v. *Wright*, 468 U.S. 737, 751 (1984)). When a litigant alleges only future injury, he "must demonstrate a realistic danger of sustaining a direct injury" to establish standing. *Id.* at 10a (quoting *Babbitt* v. *United Farm Workers National Union*, 442 U.S. 289, 298 (1979)).

Applying those principles, the court of appeals held that petitioner's claims of future injury were too

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[3] The petition for review was filed by Patrick Simmons, but the court of appeals changed the caption of the case to reflect petitioner's name; it explained that "Simmons does not even have putative standing as an individual and * * * subsequent submissions indicate that he actually represents the [United Transportation Union]." Pet. App. 2a n.1.

speculative to confer standing in this case.[4] Petitioner's allegation was that railroad workers would be harmed by the "unauthorized control and manipulation of carriers" and by "the financial wrecking of rail carriers" that would purportedly result from the challenged exemption. Pet. App. 10a. Although petitioner did not spell out this allegation of injury, the court "surmise[d]" that petitioner meant to claim that the ICC's exemption would produce at least one interlocking directorate that would not have existed otherwise; that such an additional interlock would cause a railroad bankruptcy or anticompetitive conduct; and that a union member would consequently incur injury.

The court believed, however, that the chain of events that would have to occur to inflict injury on petitioner was simply too conjectural. As to the first step of the analysis, the court found that there was no showing that the "prior approval" requirement would actually prevent the formation of any interlocking directorates or officerships. The court observed that the ICC had not rejected applications for interlocking arrangements in nearly twenty years; thus, the exemption was not likely to produce any additional interlocks. As to the second step, the court found no plausible basis for believing that a director's holding of two positions would result in the financial ruin of a railroad. Such an event would

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[4] The court applied the three-part test governing a union's standing to assert its members' claims set forth in *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). It concluded that since petitioner's members would not have standing to sue in their own right (the first factor under *Hunt*), the other two factors did not warrant discussion. Pet. App. 2a.

require the assumption that a director would violate his fiduciary duties and legal obligations by sabotaging his company's operations. Alternatively, with respect to the fear that interlocking directorates might engage in anticompetitive conduct, the court pointed out that this would not necessarily harm union members. Rather, by easing pressures to cut costs, reduced competition among railroads would be as likely to help as to harm railroad employees. Accordingly, finding the asserted injury to be "fatally speculative," the court concluded that it was insufficient to afford standing. Pet. App. 9a-12a.

The court also concluded that it was not required to defer, for Article III purposes, to statements in legislative history from the early part of this century to the effect that interlocking directorates would ruin railroads financially. The court found that such observations did not accurately describe the workings of the rail industry today and could not provide a rational basis for inferring petitioner's standing here. Pet. App. 14a-19a.[5]

In a separate opinion, Judge Ruth B. Ginsburg concurred in the denial of the petition for review. Pet. App. 22a-25a. In her view, the question of standing merged with the merits of petitioner's chal-

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[5] The court also rejected an allegation by petitioner (which the court construed as alleging "procedural" injury) that the Commission's current procedures should be retained to develop a public record on interlocking officers and directors that would facilitate challenges by petitioner to such arrangements. Pet. App. 19a-21a. "Given the utter speculativeness of the petitioner's allegation of substantive injury," the court saw "no reason to allow petitioner to sue on a theory that the ICC's exemption has made it marginally more difficult for the union to challenge interlocking directorates in the future." *Id.* at 21a.

lenge to the ICC's exemption. Accordingly, Judge Ginsburg would have reached the merits and would have ruled that petitioner's challenge to the ICC's exemption was without substance. *Id.* at 22a.

ARGUMENT

Petitioner contends (Pet. 10-16) that the court of appeals erred in holding that it lacked standing to challenge the ICC's decision in this case. The court's decision, however, is fully consistent with the fundamental principle that speculative claims of future injuries do not provide standing to litigate in federal court. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 44 (1976).

Earlier this Term, the Court reaffirmed the rule that speculative claims of injury do not satisfy Article III standing requirements. *Whitmore* v. *Arkansas*, 110 S. Ct. 1717 (1990). In *Whitmore*, the Court held that a death row inmate lacked standing to challenge another inmate's capital sentence because his theory of injury was too speculative. The Court "reiterate[d]" that "[a]llegations of possible future injury do not satisfy the requirements of Art. III." Rather, "[a] threatened injury must be 'certainly impending' to constitute injury in fact." *Id.* at 1724-1725, quoting *Babbitt* v. *United Farm Workers National Union*, 442 U.S. 289, 298 (1979). See also *Golden* v. *Zwickler*, 394 U.S. 103, 109 (1969) (refusing to entertain a former Congressman's challenge to rules that could apply to him only in some future, unplanned candidacy); *O'Shea* v. *Littleton*, 414 U.S. 488, 497 (1974) (rejecting an effort of a person to enjoin a local magistrate and judge from committing claimed illegal practices in criminal cases, when plaintiff could not show that he would be subject to future criminal

charges); *Los Angeles* v. *Lyons*, 461 U.S. 95, 105 (1983) (finding inadequate the claim of a person that he would suffer injury from an alleged illegal police "chokehold," when the injury would occur only if he were to be arrested in the future and police applied the chokehold); *Diamond* v. *Charles*, 476 U.S. 54, 66 (1986) (treating as "unadorned speculation" a physician's claim that he would be injured by non-enforcement of a law restricting abortions because he would thereby lose access to paying patients).

Similarly, here, the court of appeals correctly ruled that petitioner's theory of injury was too speculative to meet the requirements of Article III.[6] Petitioner pointed to no concrete, threatened harm that rail labor will suffer as a result of the ICC's exemption from prior approval of interlocking directorates and officerships. The ICC's consistent historical practice of approving applications for interlocking directors and officers significantly undermines the force of any contention that insisting on prior approval in each case would affect the formation of such interlocking arrangements. And the ICC's exemption does not authorize the formation of any interlocking directorates that were not permissible under prior law; the ICC simply removed an impediment to establishing such relationships in the first instance. This approach leaves in place the administrative machinery for challenging and unwinding such arrangements if they threaten the rail transportation policy committed to the ICC's care. In addition, remedies for

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[6] Indeed, the court of appeals was generous in filling in numerous gaps in petitioner's alleged theory of injury. Cf. *FW/PBS, Inc.* v. *City of Dallas*, 110 S. Ct. 596, 608 (1990) ("It is a long-settled principle that standing cannot be 'inferred argumentatively from averments in the pleadings,' * * * but rather 'must affirmatively appear in the record.'").

misconduct by interlocking directors or officers are unaffected by the ICC's order and remain available under the federal antitrust laws and under state law.[7] Against that background, petitioner's fear of hypothetical injury lacked the immediacy needed to invoke federal jurisdiction.[8]

Without seriously disputing the court's analysis, petitioner urges that standing should be conferred on it here because there is a presumption in favor of judicial review of agency action, railroad labor organizations are active participants in the ICC's regulatory process, and rail employees are within the "zone of interests" to be protected by Section 11322 (a). Pet. 10-15. But to establish standing, it is not sufficient that Congress provided for judicial review of ICC orders under the Hobbs Act, 28 U.S.C. 2341 *et seq.* Cf. *Allen* v. *Wright*, 468 U.S. 737, 754

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[7] The ICC's order also left in place substantive restrictions imposed by federal law. See 49 U.S.C. 11322(b) (prohibiting an officer or director of more than one carrier from benefitting from the issuance or sale of securities by either carrier or from participating in the determination of certain dividends payable by either carrier); 15 U.S.C. 20 (requiring competitive bidding under ICC regulations of transactions having an annual value in excess of $50,000 between carriers having a common director or officer). And, of course, rail mergers or transactions involving acquisition of control are subject to ICC approval. 49 U.S.C. 11343.

[8] Petitioner notes (Pet. 15) that in *McGinness* v. *ICC*, 662 F.2d 853 (D.C. Cir. 1981), the court entertained its challenge to an ICC order exempting designated rail operators from obtaining prior approval of interlocks without questioning its standing. But the principal issue in that case was whether the ICC had power to exempt designated operators from *labor protection* requirements. 662 F.2d at 855. The nexus between the ICC order and the claim of threatened injury to rail labor was thus far more direct than it is in this case.

(1984) ("[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court."). Nor is it enough that Congress contemplated that rail employees would have an opportunity to be heard in ICC proceedings. Cf. *Director, OWCP* v. *Perini North River Associates*, 459 U.S. 297, 304 (1983). Finally, even if petitioner satisfied the "zone of interest" test,[9] that test supplements, not supplants, the constitutional requirement that every complainant in federal court must demonstrate a concrete injury. *Clarke* v. *Securities Industry Ass'n*, 479 U.S. 388, 394 n.7 (1987).

In passing, petitioner suggests that the court should have found standing on the basis of statements in legislative history in 1914 that "there is injury from interlocking directorates." Pet. 12. The court of appeals, however, noted that interlocking directorates among railroads were formed "virtually at will over the past 40 years, despite § 11322(a), with absolutely no evidence of any railroad failure [or collusive behavior] resulting therefrom." Pet. App. 19a. In these circumstances, the court correctly held that the general views expressed in the 1914 legislative history about the dangers of interlocking directorates do not support petitioner's claim of stand-

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[9] One court of appeals recently dismissed a petition for review filed by petitioner's legislative director on the ground that rail employees' interests in challenging particular ICC actions are not within the zone of interests protected by the applicable provisions of the Interstate Commerce Act. *Simmons* v. *ICC*, 900 F.2d 1018 (7th Cir. 1990) (class exemption pertaining to the sale of a rail line) [1990 U.S. App. LEXIS 5913]; *Simmons* v. *ICC*, 900 F.2d 1023 (7th Cir. 1990) (class exemption pertaining to abandonment of rail line) [1990 U.S. App. LEXIS 5986].

ing. Moreover, even if general legislative concerns about interlocking directorates were given credence here, petitioner does not explain how those concerns are linked to its claimed threat of injury from the particular ICC action at issue. The issue here is whether the ICC's limited exemption from *prior approval* of interlocking arrangements portends any authentic threat of harm to petitioner. On that issue, the legislative history (which did not deal with such procedural issues) affords petitioner no basis for contending that it has established standing.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] Moreover, essentially the same considerations that led the court of appeals to hold that petitioner lacks standing also undermine its claim on the merits, as Judge Ruth B. Ginsburg concluded in her opinion concurring in the result (Pet. App. 22a-25a).

* The Solicitor General is disqualified in this case.

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